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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SOLANO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JAMES ANTHONY GOVER JR., Defendant.	CASE NO. VCR224653 PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF SENATE BILL 1437 DATE: 1/4/19 TIME: 9:00 DEPT: 15

INTRODUCTION

In 1978, frustrated with ineffective sentencing laws for murder and a weak and ineffective Legislature, the people of the state of California put forth and overwhelmingly passed Proposition 7, known as the Briggs Initiative, to "turn back the tide of violent crime" in California by imposing increased and lengthy prison terms for first and second-degree murder. Forty years later, believing it knew better than 71% of voters[1], the legislature dramatically upended the will of the people by clawing back the law of murder and its sentencing in violation of the California constitution.

On September 30, 2018, Governor Brown signed into law Senate Bill 1437 amending Penal Code section 188. The law eliminates decades to century old judicially recognized legal constructions that impute the malice necessary for murder on a person based on his or her participation in a crime. It also amends Penal Code section 189 to

[1] https://repository.uchastings.edu/ca_ballot_props/840/

limit those who can be prosecuted for first degree felony murder, and adding Penal Code section 1170.95 providing for resentencing of anyone previously lawfully convicted of first or second degree-murder but who could not be convicted for murder under the new law.

In early 2018, the California Assembly acknowledged in A.B. 3104, its own similar version of S.B. 1437, that any changes to Penal Code sections 189, 190 or 190.2 required a 2/3 vote of both houses to pass because such legislative action would amend Proposition 115.[2] (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3104.) Subsequently, the Legislative Counsel's office advised that the proposed amendments to Penal Code sections 188 and 189 encompassed in S.B. 1437 affecting accomplice liability would require voter approval under Article II, section 10 of the California Constitution because they affected the 1978 Briggs Initiative by changing the scope and effect of that initiative. (See Exhibit A [Legislative Counsel Bureau opinion letter dated June 20, 2018].) The Legislature chose to ignore that legal advice and passed S.B. 1437 without voter approval *and* by less than 2/3 vote in both houses, thereby usurping the will of the electors of both Propositions 7 and 115 and violating the state constitution.

The purpose of California's constitutional limitation on the legislature's power to amend initiative statutes is to "protect the People's initiative powers by precluding the legislature from undoing what the people have done, without the electorate's consent." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 781.) For the reasons originally acknowledged by the California assembly, the further reasons cited by the Legislative Counsel's Office, and the additional reasons set forth below, S.B. 1437 amending Penal Code sections 188 and 189 and adding Penal Code section 1170.95 must be stricken in its entirety as unconstitutional.

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[2] Notably, A.B. 3104 made no mention of the requirement of *voter approval* despite clearly amending Penal Code sections 190 and 190.2, which were the subject of Proposition 7 any amendment to which required voter approval.

POINTS AND AUTHORITIES AND ARGUMENT

I.

THE LEGISLATURE MAY AMEND OR REPEAL INITIATIVE STATUTES ONLY AS PROVIDED FOR IN THE INITIATIVE OR WITH APPROVAL OF THE ELECTORS

Despite the legislature's declaration in S.B. 1437 that "[t]he power to define crimes and fix penalties is vested exclusively in the Legislative branch" (S.B. 1437, § 1, subd. (a)), in adopting its constitution the people of the State of California chose *not* to vest the sole and exclusive right to enact statutes in the legislature. Specifically, article IV, section one states, "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, *but the people reserve to themselves the powers of initiative and referendum.*" (Emphasis added.) Those reserved powers of the people are contained in article II, sections eight and nine, which respectively instruct: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them," and "[t]he referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." Balancing the people's reserved power, article II, section ten provides that the Legislature "may amend or repeal a referendum statute. *The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.*" (Emphasis added.)

The purpose of limiting the Legislature's power to amend an initiative statute " 'is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." ' " (*County of San Diego v. Commission on State Mandates* 2018 WL 6037872 *8.) So important is the peoples' power that:

> Statutes and constitutional provisions adopted by the voters "must be construed liberally in favor of the people's right to exercise the reserved

> powers of initiative and referendum. The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." ' [Citations.]" (*Rossi v. Brown* (1995) 9 Cal.4th 688, 694–695, 38 Cal.Rptr.2d 363, 889 P.2d 557.) In fact, "[t]he people's reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures [citation], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Id.* at pp. 715–716, 38 Cal.Rptr.2d 363, 889 P.2d 557.)

(*Shaw v. People ex rel. Chiang* (2009) *(Shaw) 175* Cal.App.4th 577, 596.)

II.

SENATE BILL 1437 UNCONSITUTIONALLY AMENDS PROPOSITION 7

The analysis necessary to determine whether an act is or is not an amendment to a prior statute is described as follows:

> Whether an act is amendatory of existing law is determined not by title alone, or by declarations in the new act that *it purports to amend* existing law. On the contrary, it is determined by an examination and comparison of its provisions with existing law. If its aim is to clarify or correct uncertainties which arose from the enforcement of the existing law, or to reach situations which were not covered by the original statute, the act is amendatory, *even though in its wording* it does not purport to amend the language of the prior act.

(*Franchise Tax Bd. v. Cory* (1978) (*Cory*) 80 Cal.App.3d 772, 777. [Italics in original])

A legislative statute amends an initiative statute if it changes the "scope or effect" of the initiative. (*Proposition 103 Enforcement Project v. Charles Quackenbush* (1998) (*Quackenbush*) 64 Cal.App.4th 1473, 1485.) In *Quackenbush* a people's initiative statute known as Proposition 103 relating to insurance premium rollbacks enacted statutes

providing for, among other things, excess premiums paid to insurers to be refunded to policyholders after premium rollbacks were applied. The initiative reserved to the legislature the power to amend the provisions of Prop. 103 only to further serve the purpose of the initiative, and then by either 2/3 vote in both houses or voter approval. (*Id.* at p. 1479) Subsequently, the legislature passed a separate statute that directed the insurance commissioner to deduct certain expenses incurred by insurers from its total premium income, which had the effect of reducing an insurer's overall rollback obligation. (*Id.* at pp. 1479-80.) The proponents of Prop. 103 sued for injunctive relief arguing the legislative statute resulted in an unauthorized amendment to Prop. 103 because it effectively reduced the amount of refund due policyholders after rollbacks, and in so doing the amendment did not serve the purpose of the initiative. (*Id.* at p. 1478) The insurance commissioner argued that the statute passed by the legislature was not "directed to any provision of Proposition 103, let alone [toward] changing the scope and effect for such a provision by adding or subtracting something from it." (*Id.* at p. 1484.)

Citing *Cory*, the *Quackenbush* court began with the definition of an amendment and noted it as:

> [A]ny change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provision which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise or supplement, or by an act independent and original in form . . . A statute which adds to or takes away from an existing statute is considered an amendment . . . [A]n amendment [is] a legislative act designed to change some prior or existing law by adding or taking from it some particular provision."

(*Quackenbush, supra*, 64 Cal.App.4th at p. 1485.)

The court in *Quackenbush* further recognized that in determining whether a particular action constitutes an amendment "[i]t is the duty of the courts to jealously guard [the people's initiative and referendum power]." ". . . [I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not

improperly annulled." (*Quackenbush*, *supra*, at p. 1485. [internal citations omitted]) Further, the court stated, "Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise." (*Id.* at p. 1486 [italics in original].)

Ultimately, the court held that the legislature could not "indirectly accomplish via the enactment of a statute which essentially amended a formula adopted to implement an initiative's purpose, what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions." Then, quoting our supreme court in *Sheehy v. Shinn* (1894) 103 Cal. 325, 340, the court stated, "To give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." (*Quackenbush*, *supra*, at p. 1487.) Finding the independent statute was an amendment of Prop. 103, the court found the legislative statute "constitutionally invalid as an act in excess of the legislature's powers." (*Ibid.*)

Similarly, in *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (*Mobilepark*), the Court of Appeal examined whether a city ordinance seeking to clarify alleged ambiguities in a city ordinance relating to controls of mobile home space rent increases passed by voter initiative – Proposition K – by redefining the term "tenant" used in the initiative to expand its meaning, and by adding additional requirements to the original initiative ordinance was an improper legislative amendment of an initiative measure which did not reserve amendatory authority to the City. (*Mobilepark*, *supra*, (1995) 35 Cal.App.4th 32, 39-40.)

First, the court established that it was relying on *Franchise Tax Bd. v. Cory*, *supra*, for the definition of "amendment." (*Mobilepark* at p. 40.). Next, citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 788, the court recognized that "the Supreme Court explained that such provisions (Elections Code sections 9217 and 9125, which mirror article II, section 10 of the Constitution), have their roots

in the constitutional right of the electorate to initiative, ensuring that successful initiatives will not be undone by subsequent hostile boards of supervisors." (*Mobilepark* at p. 41.) Finally, the court examined the changes made by the city to the voter initiative and found them to be amendatory within the meaning of *Cory* and not clarifying of any ambiguities within the initiative, thus improper and facially invalid. (*Id.* at pp. 42-43.)

In rejecting the City's primary argument the court stated, "[The City's] ordinance goes beyond the original scope of Proposition K by adding to the definition of tenants affected by the initiative, and by requiring owners to offer certain options and disclosures before exempt leases may be executed." And that, "Proposition K is not an ambiguous measure in its definition of the "tenant" to be governed by the rent protection ordinance (not including prospectivc tenants). Nor are any ambiguities raised by the terms of Proposition K as to the requirements for entering into rent control-exempt leases, such as [the City's ordinance] addresses." Finally, the court rejected the City's contention that its ordinance was a "separate ordinance [which does] not purport to amend [Proposition K" because it was merely legislation in a related but distinct area, holding instead that "because Proposition K establishes comprehensive rent control procedures, its scope of coverage and the conditions under which a rent control exempt lease may be entered into are not merely a related area, but rather go to the heart of the coverage of the initiative measure." (*Mobilepark* at pp. 42-43.)

A. Senate Bill 1437 Created Penal Code Section 1170.95, Amending Proposition 7

In 1978 seventy-one percent of the voters in California passed Proposition 7 known as the Briggs Initiative (hereinafter "Prop. 7"). The purpose of the initiative was to "turn back the rising tide of violent crime that threatens each and every [Californian]" by promulgating longer sentences for first-degree and second-degree murder and creating a tough and effective death penalty law. (See Murder. Penalty California Proposition 7 (1978), http://repository.uchastings.edu/ca_ballot_props/840.) Proposition 7 amended

Penal Code section 190[3] to set the minimum term for first-degree murder at 25-life and to increase the punishment for second-degree murder from a determinate term triad to 15-life. Senate Bill 1437's newly-created Penal Code section 1170.95 amends Prop. 7 by authorizing the trial court to resentence defendants previously lawfully convicted and sentenced for first and second-degree murder to a sentence other than 25 or 15 to life.

The legislative digest of S.B. 1437 recognized that existing law enacted by Prop. 7 prescribes the penalties for first and second-degree murder, and further recognized that the bill would provide a means of vacating previously valid first and second-degree murder convictions and resentencing defendants. (See Legislative Counsel's Digest to Senate Bill No. 1437, Chapter 1015.) The law accomplished the sweeping murder sentencing overhaul by adding section 1170.95 to the Penal Code providing for a petition process by which a defendant previously lawfully convicted and sentenced for first or second-degree murder can seek resentencing in the trial court to a sentence substantially less than 15 or 25 to life. Thus, the resentencing provision changes the scope and effect of Proposition 7 by permitting courts to impose sentences on those convicted for first and second-degree murder to something other than the sentences authorized by the voters in1978 without the approval of the electorate.

Voters are deemed aware of laws in existence at the time of approving an initiative, including the definition of the crime for which they are imposing a sentence. (*Professional Engineers in California Government v. Kempton* (2007) (*Kempton*) 40 Cal.4th 1016, 1048; *People v. Weidert* (1985) (*Weidert*) 39 Cal.3d 836, 844 [enacting body deemed aware of existing laws and judicial constructions in effect at time legislation is enacted]; *In re Lance W.* (1985) 37 Cal.3d 873,890, fn.11 [principle applies to legislation enacted by initiative].) Further, "[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise

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[3] Prop. 7 also amended Penal Code section 190.2, which is not in controversy here.

and technical sense which had been placed upon them by the courts." (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.) The presumption is equally applicable to measures adopted by popular vote. (*Perry v. Jordan* (1949) 34 Cal.2d 87, 93; See also, *In re Jeanice D.* (1980) 28 Cal.3d 210, 216.)

When the people passed Prop. 7 murder was defined as "the unlawful killing of a human being with malice aforethought and divided into first and second-degree murder. All murder not murder in the first degree as defined in section 189, was murder in the second-degree. (Pen. Code, §§ 187, 189.) First-degree felony murder, originally codified from the common law rule in California in 1850, was defined as a killing "committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288." (Pen. Code, § 189; *People v. Dillon* (1983) (*Dillon*) 34 Cal.3d 441, 472.)

In addition to the statutory definitions of first and second-degree murder in existence at the time Prop. 7 was passed, voters were presumed aware that California courts had long-construed the murder statutes to apply to defendants where the malice necessary for murder was imputed to a defendant – either the direct perpetrator of the killing or his or her accomplice – based solely on his or her participation in a crime. Second-degree felony murder had been judicially recognized as early as1964. (*People v. Ford* (1964) (*Ford*) 60 Cal.2d 772, 795 ["Homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second-degree murder."].) Both conspirator liability and the natural and probable consequences doctrine as applied to murder was first judicially recognized in 1907. (*People v. Kauffman* (1907) (*Kauffman*) 152 Cal. 331, 334 [". . .[W]here several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even

though it was not intended as a part of the original design or common plan."].) And so-called "provocative act murder" was recognized by our Supreme Court as early as 1965.

Thus, when the voters passed Prop. 7 increasing the penalty for defendants convicted of either first or second-degree murder as it was then defined and long-recognized by California courts, the initiative applied to all duly convicted murder defendants that S.B. 1437 now seeks to allow to be resentenced to terms far below that which was mandated by the people. Our constitution requires that such action be approved by the voters.

B. Senate Bill 1437 Amended Penal Code Section 188 Eliminating Imputed Malice Murder Constructions, and Penal Code Section 189, Requiring Additional Conduct to be Held Liable for First-Degree Felony Murder, Both of Which Amend Proposition 7 by Narrowing Its Scope

The parallels and applicability of *Quackenbush* and *Mobilepark* to S.B. 1437 is compelling and supports the invalidation of S.B. 1437. Senate Bill 1437 amends the scope of Proposition 7 by limiting who can be convicted and punished for first and second-degree murder by adding requirements for murder liability not previously required by eliminating imputed malice and by adding new affirmative requirements for felony-murder liability.

Senate Bill 1437 amends Penal Code section 188 non-substantively by reorganizing it and breaking the section down into separate subdivisions. It amends section 188 substantively by adding subdivision (3), which says, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Senate Bill No. 1437, § 2.)

The bill likewise amends Penal Code section 189 non-substantively by breaking that section down into subdivisions and incorporating specific statutory definitions for the terms used within it. It amends section 189 substantively by adding subdivision (e), which reads:

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(Senate Bill No. 1437, § 3.)

Proposition 7 mandated life sentences for all defendants who could be convicted of first or second-degree murder as defined by statute and which had been judicially construed at the time the initiative was passed, including first degree felony murder, second-degree felony murder, murder under co-conspirator and natural and probable consequences doctrines, and provocative act murder. Each imputes the implied malice necessary for murder onto the defendant based on his or her participation in a crime that results in murder. The effect of the substantive amendments to Penal Code sections 188 and 189 is to reduce the total number of individuals eligible for punishment for first or second-degree murder by eliminating long standing judicial constructions in existence when Prop. 7 was passed and by redefining who can be liable for first degree murder under the felony murder rule. Indeed, the exact intended effect as stated in section one of the bill was to ". . . limit convictions and subsequent sentencing . . . and assist[] in the reduction of prison overcrowding . . ." Not only does S.B. 1437 change the effect of Prop.

7 in the manner explained in *Quackenbush,* it changes its full scope and reach of Prop. 7 in the manner explained in *Mobilepark.*

To determine exactly how S.B. 1437 changes the scope of Prop. 7, it is necessary to first examine the voters' intent in promulgating and passing the initiative; that is, how far a reach did the voters want the initiative to have? Did the voters really want the increased punishments for murder to reach *everyone* who could be convicted of first or second-degree murder as it existed at the time to the extent that they wished to bind future legislatures and prevent that body from narrowing the scope of Prop. 7 by shallowing the pool of eligible murder defendants by simply changing the elements of murder so fewer defendants could be convicted and punished?

In gaining an understanding of the scope of Prop.7 the voters intended it to have it is important to start with the proposition that, "[t]here is a presumption, though not conclusive, that voters are aware of existing laws at the time a voter initiative is adopted." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 410.) "Ballot pamphlet arguments have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote. [Citations.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171; see also *Santos v. Brown* (2015) 238 Cal.App.4th 398, 410; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313.) Likewise, ballot explanations by the Legislative Analyst are also a source of construing voter intent. (*In re Lance W., supra*, 37 Cal.3d at p. 888; *People v. Walker* (2016) 5 Cal.App.5th 872, 877.)

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. [Citations.]" (*In re Lance W.* (1985) 37 Cal.3d 873, 889; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099-1100.) " '[I]n the case of a voters' initiative statute … we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' " (*Robert L. v. Superior Ct.* (2003) 30 Cal.4th 894, 909, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *People v. Rocco* (2012) 209 Cal.App.4th 1571, 1575.)

"[R]ules of statutory construction are the same whether applied to the California Constitution or a statutory provision (*Winchester v. Mabury* (1898) 122 Cal. 522, 527), and '[t]he same rules of interpretation should apply to initiative measures enacted as statutes.' (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 672.)" (*People v. Bustamante* (1997) 57 Cal.App.4th 693, 699, fn. 5; see also *People v. Estrada* (2017) 3 Cal.5th 661, 668; *People v. Rizo* (2000) 22 Cal.4th 681, 685.)

> When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure.

(*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; see also *People v. Arroyo* (2016) 62 Cal.4th 589, 593; *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 922-923.)

The subject of Prop. 7 was the penalty for murder, both prison and the death penalty. The ballot argument in favor of Prop. 7 highlights the "deadly plague of violent crime which terrorizes law-abiding citizens" and criticizes the Legislature for passing penalties that are "weak and ineffective." The argument speaks to a desire to have the "nation's toughest, most effective" penalties for murder and notes that "judges and law enforcement officials have agreed that Proposition 7 will provide them with a powerful weapon of deterrence in their war on violent crime." (Murder. Penalty California Proposition 7 (1978), http://reposiory.uchastings.edu/ca_ballot_props/840.)

The overall tone and concern expressed in the arguments together with the significant changes actually made to the various penalties for murder, make clear the intent of the electorate to secure the community against violent crime by imposing lengthy prison terms or the death penalty on all defendants who could be convicted of murder under then-existing law. Thus, the broad application and scope

of the initiative was as much a part of the proposition as was the actual increased prison terms promulgated by its passage. So significant was the electorate's disdain for legislative weakness in establishing murder penalties as demonstrated by the tone of the ballot arguments that the proposition was drafted in such a way as to bind all future legislatures from making any changes to the effect or scope of the measure unless the people approved. Today's Legislature, however, has indeed undermined the will of the electorate by its changes to Penal Code sections 188 and 189, as recognized in the legislative counsel's digest to S.B. 1437 and clearly stated in section one of the law itself.

C. Any Amendments to Proposition 7 Require Voter Approval

The power vested in the electorate to decide whether the Legislature can amend an initiative statute is absolute. (*Amwest Surety Ins. Co. v. Wilson* (1995) (*Amwest*) 11 Cal.4th 1243, 1251. Proposition 7 did not reserve power to amend its provisions to the legislature. Therefore, any legislative statutes which amend Prop. 7 require voter approval. (CA Const., art. II, §10.) Senate Bill 1437 amended Prop. 7 and was not approved by the voters. It is therefore, unconstitutional and must be stricken.

III.

SENATE BILL 1437 UNCONSITUTIONALLY AMENDS PROPOSITION 115

California voters passed Proposition 115 known as the Crime Victim's Reform Act (hereinafter "Prop. 115"). Among the goals of the people in enacting Prop. 115 was to "create a system in which violent criminals receive just punishment. . . . and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools." (Prop. 115, § 1, subd. (c).) To that end, and among other things, Prop. 115 amended Penal Code section 189 expanding the definition of first-degree murder to include murder committed during the commission or attempted commission of five additional serious crimes. (Prop. 115, § 9.)

Proposition. 115 also amended Prop. 7, expanding its scope by increasing the overall number of individuals eligible for punishment for first degree felony murder. However, unlike S.B. 1437, the voters approved the change to Prop. 7's scope when they approved Prop. 115. Prop. 115 in turn reserved power to amend its provisions to the

legislature, but only "by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (Prop. 115, § 30.)

Section 3 of S.B. 1437 amended Penal Code section 189 by adding subdivisions (e) as outlined above and (f), which precludes the application of subdivision (e) if the murder victim is a police officer killed in the course of his or her duties. By its terms, Prop. 115 requires either voter approval or a 2/3 vote in both houses to make this change since Penal Code section 189 is a "statutory provision[] contained in this measure." (Prop. 115, § 30.)

Recently, our Supreme Court held:

> When technical reenactments are required under article IV, section nine of the Constitution – yet involve no substantive change in a given statutory provision – the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute.

(*Commission on Mandates*, *supra*, 2018 WL 6037872 *8, 23. [italics in original

In *Commission on Mandates* the state was attempting to get out from under its obligation to reimburse counties for costs associated with certain aspects of civil commitment proceedings for sexually violent predators under The Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.), claiming that the 2006 voter-enacted Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83) substantively amended and reenacted various statutes that served as the basis for the reimbursement mandate and therefore costs previously associated with SVPA proceedings were no longer a state mandate requiring reimbursement, but a voter mandate with costs to be borne by the counties. (*Commission on Mandates*, *supra*, at pp. 1-2.) At issue was whether the statutes that had been amended by Prop. 83, and then reenacted in full as amended as required by the constitution, did in fact make substantive

changes to the SVPA or were merely technical. The Court held they had not. (*Id.* at p. 3.) The Court went to some length to emphasize that its holding pertained to the wholesale reenactment of a statute without substantive change. It spoke of the underlying purposes of Prop. 83, which had re-enacted the SVP provisions but did "not focus on duties local governments were already performing under the SPVA." (*Commission on Mandates, supra*, at p. 22.) By way of contrast, the Court looked at *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, where legislative deviations of money from a trust fund created by Prop. 116 were improper amendments of the electorate's enactment outside of the proposition's authorization. The Court in *Commission on Mandates* said this sought "to undo the very protections the voters had enacted," (*Id.* at p. 21), and went to "the heart of a voter initiative." (*Id.* at p. 20.)

Relevant to the argument here, it was noted by the court in Commission on Mandates that Prop. 83 did expand the definition of a sexually violent predator, and "[a]lthough the SVP definition does not *itself* impose any particular duties on local governments, it is necessarily incorporated into each of the listed activities. Indeed, whether a county has a duty to act (and, if so, what it must do) depends on the SVP definition." (*Commission on Mandates, supra*, 2018 WL 6037872 at pp. 26-26 [italics in original].) The Court, therefore, remanded the matter back to the Commission to determine whether and how the initiative's expanded definition of an SVP may affect the state's obligation to reimburse the Counties for implementing the amended statute. (*Id.* at p. 3.) Thus, the question was left open whether amending the statute to broaden the definition of an SVP, resulting in a larger group of individuals who could be subject to the law thus triggering a county's duty to act is a substantive change.

Prop. 115 amended Penal Code section 189 to add five additional serious felonies to the felony murder rule, including kidnapping, sodomy, oral copulation of a minor, forced sexual penetration, and train wrecking. The question is whether Penal Code section 189's re-enactment in S.B. 1437 with the amendments was simply to make technical non-substantive changes to it thus not requiring the 2/3 vote required by Prop. 115. It was not. It is true that some of the changes to the section are nominal and non-

substantive – S.B. 1437 reorganized the section and included statutory definitions for some of the terms used within it – but as a plain reading of newly-added subdivision (e) demonstrates, S.B. 1437 substantially limits who can be liable for felony murder in California by requiring additional elements be proved that were not included in Prop. 115's version of Penal Code section 189.

Prop. 115 did not merely re-enact Penal Code section 189 as required by the Constitution to make minor technical, non-substantive changes to it. The heart of Prop. 115 focused on the fact that "the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system." (Prop. 115, § 1(a).) Furthermore, "[t]he goals of the people in enacting this measure are . . . to create a system in which violent criminals receive just punishment, . . . and in which society as a whole can be free from fear of crime in our homes, neighborhoods, and schools." (Prop. 115, § 1(c).) Removing culpability from felony murder cannot be said to be anything other than at odds with those goals.

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Since the original amendment to section 189 contained in Prop. 115 was not a mere technical change, but rather, a substantive one, any further substantive changes to Penal Code section 189 require 2/3 approval vote in both houses as mandated by Prop. 115. Senate Bill 1437 thereafter substantively changed section 189 and did so without the necessary 2/3 approval vote in both houses.[4] It is therefore an unconstitutional amendment and must be stricken.

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[4] http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=20172018OSB 1437

CONCLUSION

The court should deny defendant's motion to dismiss because Senate Bill 1437 amended Proposition 7 and was not approved by the voters. Accordingly, Senate Bill 1437 is unconstitutional and must be stricken. Furthermore, since the passage of Proposition 115, any substantive changes to Penal Code Section 189 requires a 2/3 approval vote in both houses. The required 2/3 approval in both houses did not occur. Therefore, Senate Bill 1437 is an unconstitutional amendment that must be stricken because it usurps the will of the electors violating the state constitution.

DATED: January 3, 2019

Respectfully submitted,
KRISHNA A. ABRAMS
District Attorney

ERIC M. CHARM
Deputy District Attorney

EXHIBIT A

June 20, 2018

Honorable Jim Cooper
Room 6025, State Capitol

FELONY MURDER ACCOMPLICE LIABILITY - #1813978

Dear Mr. Cooper:

Pursuant to your request, we have prepared the enclosed measure relating to the accomplice liability for felony murder.

The proposed measure, if enacted, would prohibit malice, for purposes of a conviction of murder, from being implied based solely on a person's participation in a crime (Sec. 1; Sec. 188, Pen. C.). Additionally, the proposed measure would prohibit a participant in the perpetration or attempted perpetration of one of the felonies that can result in a conviction for first degree murder if a death occurs, from being liable for murder, unless the person was the actual killer; was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer; or the person was a major participant in the underlying felony and acted with reckless indifference to human life (Sec. 2; Sec. 189, Pen. C.). The effective result of the proposed measure would be to reduce the number of people who could be convicted of murder and, instead, make those people eligible for conviction only for the underlying felony offense.

Section 190 of the Penal Code (Section 190), enacted by Proposition 7, which was adopted by the voters in the June 5, 1978, statewide general election, established increased sentences for the commission of first degree and second degree murder. The courts generally presume that the voters were aware of existing law at the time of approving the initiative, including the definition of the crime for which they were imposing a sentence (see, for example *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048 (voters presumed to be aware of existing law when they approve a ballot proposal)). Relevant to this measure, Section 189 of the Penal Code at the time the voters enacted Proposition 7 enumerated a discreet list of actions for which an individual could be convicted of first degree murder, including felony murder. Thus, by enacting Proposition 7 the voters

contemplated that felony murder, and the accomplice liability for felony murder, would be punishable according to the increased penalty enacted by the initiative.

The California Constitution authorizes the Legislature to amend or repeal an initiative statute only by a statute that becomes effective when approved by the electors, unless the initiative statute permits amendment or repeal without their approval (see subd. (c), Sec. 10, Art. II, Cal. Const.). A legislative proposal constitutes an amendment of an initiative statute if it changes the scope or effect of the initiative (*Proposition 103 Enforcement Project v. Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1485). Proposition 7 does not permit amendment by the Legislature, and thus any amendment would have to be submitted to the voters to become effective.

The legal effect of your proposed measure would be to reduce the number of people who could be convicted of murder and, instead, make those people eligible for conviction only for the underlying offense, for which a different sentence applies. Thus, the proposed measure constitutes an amendment of Proposition 7 because it changes the scope and definition of murder on which the voters relied when enacting Section 190 by initiative in 1978. As such, the proposed measure requires the approval of the electors to become effective, in compliance with Section 10 of Article II of the California Constitution.

If you wish further assistance with this measure, please contact the undersigned deputy.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

Sharon L. Everett

By
Sharon L. Everett
Deputy Legislative Counsel

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SLE:rah

PROOF OF SERVICE

I, the undersigned, certify under penalty of perjury that my business address is the Office of the District Attorney, 675 Texas St., Suite 4500, Fairfield, Solano County, California and I am not a party to the within entitled action;

On January 3rd, 2019:, I served the attached: **PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF SENATE BILL 1437 FOR JAMES ANTHONY GOVER, VCR224653.**

☐ Hand delivering a true copy thereof to the Office of the Public Defender:

☒ Hand delivering a true copy thereof to the Office of the Alternate Public Defender
ATTN: APD BARRETT

☐ Hand delivering a true copy thereof to the Staff Attorney:

☐ Placing a true copy at the DA Reception Desk for pickup by:

☐ Placing a true copy in a sealed envelope, for mailing thru the Solano County Central Mail Services:

☐ Placing a true copy in a sealed envelope, postage hereon fully prepaid, and deposited in the United States Mail in Fairfield, California, addressed to the following:

☐ By facsimile to the following:

I declare under penalty of perjury that the foregoing is true and correct. Executed This 3rd Day of January, 2019 at Fairfield, California.

Heather Tatum

Heather Tatum
Legal Secretary

PROOF OF SERVICE

I, the undersigned, certify under penalty of perjury that my business address is the Office of the District Attorney, 675 Texas St., Suite 4500, Fairfield, Solano County, California and I am not a party to the within entitled action;

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☒ Hand delivering a true copy thereof to the Office of the Public Defender:

☐ Hand delivering a true copy thereof to the Office of the Conflict Defender:

☐ Hand delivering a true copy thereof to the Staff Attorney:

☐ Placing a true copy at the DA Reception Desk for pickup by:

☐ Placing a true copy in a sealed envelope, for mailing thru the Solano County Central Mail Services:

☐ Placing a true copy in a sealed envelope, postage hereon fully prepaid, and deposited in the United States Mail in Fairfield, California, addressed to the following:

☒ By fax to the following:

AMY MORTON
FAX# 707-644-7528

I declare under penalty of perjury that the foregoing is true and correct. Executed This 3rd Day of January, 2019, at Fairfield, California.

Heather Tatum

Heather Tatum
Legal Secretary

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☒ By fax to the following:

THOMAS MAAS
FAX# 707-423-1911

I declare under penalty of perjury that the foregoing is true and correct. Executed This 3rd Day of January, 2019, at Fairfield, California.

Heather Tatum

Heather Tatum
Legal Secretary